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No. 85-1555.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1985

LEONARD J. ROSE
PETITIONER

v.

TOWN OF HARWICH
RESPONDENT

OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Questions Presented

Respondents agree with the identification of the Question Presented by the Petitioner.

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Opinions Below

Respondent agrees with the identification of the opinions as stated by the petitioner.

Constitutional Provisions

Respondent agrees with the Constitutional Provisions stated by the petitioner.

Statement of the Case

Petitioner seeks certiorari to review the decision entered by the United States Court of Appeals First Circuit affirming

the summary judgment for the Defendant, Town of Harwich entered March 25, 1985 by the United States District Court District of Massachusetts in Civil Action #810075-S (A. 1, A. 12).

In affirming the decision of the District Court, the Court of Appeals held:

(1) That Rose had brought a civil action against the Defendant, Town of Harwich in State Court. (Barnstable Superior Court #38674) in December of 1978 wherein he sought to have set aside as invalid an eminent domain taking for water supply purposes made by the Town ten years earlier in 1968. In the alternative, Rose sought damages for said taking (A. 2).

(2) That the State Court action was tried and a judgment for Defendant dismissing the action as time barred was entered June 23, 1980 (A. 2, A. 3).

(3) That the State Court judgment was a judgment "on the merits" (A. 8). That the claims Rose sought to raise in Federal Court arose from the identical transaction or series of connected transactions as the claims asserted in the State Court *i.e.*, the land taking and therefore, the federal action was barred by the doctrine of *res judicata* and specifically the "claim preclusion" aspect of *"res judicatus"* (A. 4).

(4) That Rose failed to show any reason why he was entitled to any exception from the well established doctrine of res judication (A. 10).

The facts giving rise to the case are as set forth by the Trial Judge in his *Decision of Jurisdictional Motion* (A. 16).

Reasons for Denying Writ

I. CERTIORARI SHOULD BE DENIED, BECAUSE THE STATE COURT JUDGMENT IS BASED ON A STATUTE G.L. c. 79 WHICH IS NOT CONSTITUTIONALLY INFIRM.

The pertinent sections of the statute are set forth in Appendix E of the Petition (A. 22). Petitioner attacks the statute as unconstitutional on two grounds:

(a) It enables a taking authority to acquire title to land (which by legislative action they have been authorized to take) prior to giving notice to an individual owner and prior to payment of compensation.

(b) The limitation on actions set forth in the statute creates the possibility of disparate application to potential litigants.

In common with most eminent domain statute, G.L. c. 79, provides for notice and payment of compensation after, rather than before, a taking has been made. In *Kirby Forest Industries Inc. v. United States,* ____ U.S. ____, ____, 104 S.Ct. 2187, 2191 (1984) this court acknowledged that Congress can enact a statute appropriating property immediately by legislative taking and set up a proceeding for ascertaining after the appropriation the compensation due the owners. The Court in Kirby also pointed out that the government can acquire privately owned land summarily by entering into possession and ousting the owner *Id.* The owner has of course the right to sue for damages. It is the right to bring an action for and be paid damages that is guaranteed by the constitution, not the right to receive prior notice of a taking. *Chicago Burlington & Quinay Railroad v. Chicago,* 166 U.S. 226, 236 (1897); *Trager v. Peabody Development Authority,* 367 F. Supp. 1000 (D. Mass. 1973).

General Laws c. 79 provides for notice and the right to damages, but does not allow an unlimited time to bring suit. In this case the Town took the land in 1968 and in 1969 built a water tower thereon. No notice was given to Rose by the Town because as the trial Judge found and contrary to Rose's naked assertions, the Town for legitimate reasons set forth in the decision did not know any land belonging to Rose had been taken (A. 17, 18). Under these circumstances the statute requires an action be brought within six months of entry on the land by the taking authority and construction of improvements thereon. Entry constitutes constructive notice which starts the clock running.

Petitioner relies heavily on *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1949) to argue the constructive notice provisions of G.L. c. 79 do not meet constitutional due process requirements. However, Mullane did not involve the eminent domain power of the state. It involved the sufficiency of notice to beneficiaries on judicial settlement of accounts by trustees of a common trust fund. The considerations, constitutional and otherwise in Mullane and the instant case are too dissimilar for Mullane to be reliable as authority. Nevertheless, to the extent *Mullane* is parallel, it dealt with the question of the adequacy of *constructive* notice to *known* parties. The instant case involved constructive notice as an alternative to actual notice when the parties are unknown. Again, the trial judge found that the Town did not know Rose claimed land in the area taken and that there were good reasons why that was so. Rose asserts the contrary, but the assertion is unsupported by evidence. Rose says, for example, his land was shown on the Harwich Assessors Map (p. 10). That statement is incorrect. Rose's land was never shown on the assessors maps. Rose says that neither a title examiner nor a surveyor hired by Rose had any difficulty locating the land. This statement is incorrect as Rose well knows. A survey of the land has never been done and in 1972, when Rose conveyed the land to himself and his mother, he was told, by the lawyer who drew the deed, that the land had been lost to him not by a Town taking, but through private land registration proceedings under the Torrens system of title registration. He was told this because, based on Rose's deed description, the land is not where the water tower is but is about a half mile further west at the corner of John Joseph Road and Route 39 and the land at that location has been registered in Land Court and is now of other owners.

Where as here the court has found the parties in interest to be unknown, the *Mullane* case does not apply. Constructive notice is all that can be given in such a case. The constructive notice relied on by G.L. c. 79 is not a mere publication by re-

cording an order of taking or a newspaper advertisement. Entry is required. Entry on the land is and should be notice to a property owner to look after his rights. The law does and should require an owner to look to his property to protect it. The doctrine of adverse possession speaks clearly to that obligation as does G.L. c. 79.

(b) Rose next argues that the time limitation on bringing an action potentially provide different time periods to different parties depending on when actual notice is received. This argument was not made to either the State Court, the United States District Court nor to the Court of Appeals and, its appearance here gives emphasis to the need to require litigants to seek adjudication of all claims on all theories of law at one time and in one forum when the same transaction is at issue.

The Court traditionally have held statutes of limitations in general constitutional and not repugnant to concepts of due process. Periods of limitations are established to cut off rights, justifiable or not, that might otherwise be asserted and such periods of limitation should be strictly adhered to by the judiciary. *Kavanagh v. Noble,* 332 U.S. 535, *rehearing denied,* 333 U.S. 850 (1948). Indeed, the Supreme Court has held even a constitutional claim can become time barred just as any other. *Block v. North Dakota,* 461 U.S. 273 (1983), *on remand sub nom., State of N. Dakota ex rel. Bd. of University and School Lands v. Andrus,* 711 F.2d 118 (1983).

Despite the deference this Court has accorded to the Legislatures' wisdom vis a vis Statute of Limitation, Rose would argue G.L. c. 79, § 16 creates a "rag tag multitude of disparate classes" (Petition p.13). A fair reading of the statute does not support this position and courts in any event should not rewrite a statute because they might deem its effect susceptible of improvement. *Badaracco v. Commissioner,* 464 U.S. 386, 104 S.Ct. 756 (1984), *see also Peeke v. Penn Central Transp. Co. Inc.,* 403 F. Supp. 70 (E.D. Penn. 1975) *aff'd.,* without written decision, sub. nom. *Celotex Corp. v.*

Whiting Corp., 538 F.2d 318 (3rd Cir. 1976) (Courts have the power to construe statutes of limitations but they do not have the power to overrule them); *Mattewnan v. Akahane*, 574 F. Supp. 1510 (D.C. Hawaii 1953) (limitation period established by statute of limitations is necessarily arbitrary and its improvement best left to the legislature, not a court); 1 Nichols, *Eminent Domain*, § 4, 102 (2) (rev. 3d ed. 1980) (establishment of reasonable limitations period for actions arising out of takings of land for public use is a matter entrusted to the discretion of the Legislature).

Statutes of limitations barring land claims have consistently been upheld by the courts. In *Curtner v. United States*, 149 U.S. 662 (1893) the court upheld a California statute of limitations which, in actions to recover lands, barred the claim in five years. In *Hero Lands Co. v. United States*, 727 F.2d 118, *cert. denied*, ____ U.S. ____, 104 S.Ct. 2346 (1984). The court upheld a federal statute barring landowners from seeking compensation for irrigation easement after six years. *See also Stewart v. Keyes*, 295 U.S. 403 (1935) (upholding state statute of limitations barring recovery of real property).

Massachusetts courts have consistently held statutes of limitation barring land owners claims valid. Underlying the statute (G.L. c. 79, § 16) are important public policy considerations the most obvious of which is the need for an efficient and final determination of any dispute regarding a public landtaking so that title to the land taken can be settled, damages for the taking assured, and construction of the public improvement undertaken and completed *Whitehouse v. Town of Sherborn*, 11 Mass. App. Ct. 668 (1981). In *Eldredge v. Board of Selectmen of Brewster*, 18 Mass. App. Ct. 502 (1984) the court found it was well settled that any person claiming damages must file a petition within the limitations period of G.L. c. 79, § 16. Likewise, in *Appelton v. Newton*, 178 Mass. 276 (1901), the court held a three year statute of limitation constitutional and in *Boyce v. Greater Lowell Regional Vocational*, 7 Mass. App. Ct. 639 (1979) the court held that a petition under G.L. c. 79 for the assessment of damages

was untimely and defendants motion for directed verdict should have been allowed.

Rose is clearly barred by the statute of limitation in G.L. c. 79. He filed his original action nearly eighteen months after he received notice of the "taking" and roughly nine years after the water tower was constructed. As the Court of Appeals noted even if it was assumed the "Massachusetts statute of limitations would offend the Constitution if applied literally, Rose himself was not treated with extreme unfairness insofar as the statute was applied to him." The Court of Appeals also did not find the State Court's decision was "plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme." (see A. 9, A. 10) "Rose is not suing in federal court to recover damages that have accumulated since his suit in State Court; rather he is seeking a second chance to establish the illegality of events that occurred more than fifteen years ago." (A. 9, A. 10).

II. Certiorari Should Be Denied, Because the State Court Judgment Itself Was Neither Void Nor Constitutionally Infirm and Therefore, as the District Court and the United States Court of Appeals Found Is Entitled to Preclusive Affect.

Petitioner next argues that the State Court decision was void and that the Defendant, Town of Harwich is therefore, not entitled to application of the doctrine of *res judicata* in connection therewith. This argument is based on the suggestion that the State Court Judge had a "mind-set" (A. 15) that somehow was prejudicial to Rose's position. Citing excerpts from the Memorandum of Judge Travers, the Trial Judge (A. 16), Rose appears to argue that the proceedings in the State Court did not give him a fair opportunity to present his case and/or did not provide a fair result.

A reading of the Judge's memorandum, in the opinion of the respondent supports the contrary conclusion. As the

record below indicates, this case enjoyed a full hearing on the merits notwithstanding the Town filed at the outset a Motion to Dismiss. The Trial Judge afforded Rose every opportunity to introduce any and all evidence Rose had in support of his claim for damages or in support of his allegations set forth in his complaint that the taking was invalid.

Rose is understandably unhappy with many if not most of the Judge's findings of fact, but they are findings of fact entered after a long evidentiary hearing the basis for which findings in many if not most cases was Rose's own testimony.

Regardless of how Rose might characterize the Judge's "mind-set", it cannot be argued that the result does not follow the Law (G.L. c. 79). There can be no doubt based on a fair reading of the statute nor does Rose dispute the fact that the action which he brought in Superior Court in Barnstable County was time barred. He himself filed a motion to dismiss it as time barred (A. 15). A reading of the decision of Judge Travers clearly indicates that Judge Travers was sensitive to the constitutional questions and considered them. For this reason and other reasons the District Court and the Court of Appeals were satisfied that the proceedings in State Court were proceedings on the merits which resulted in a valid final judgment which barred Federal Court proceedings seeking to litigate the same transaction.

III. Certiorari Should Be Denied Because Neither the United States District Court Nor the United States Court of Appeals Committed an Error of Law in Ruling that the State Court Judgment Rendered on Rose's Complaint Was a Judgment on the Merits Which Precluded Rose From Successfully Bringing a Separate Action in Federal Court Based on the Same Transaction or Series of Transactions.

As the Court of Appeals stated (A. 3), "The basic legal doc-

trine that governs this case is that of 'claim preclusion.' The Restatement (2nd) of Judgments describes this aspect of *res judicata* as follows:

A valid and final personal judgment rendered in favor of the Defendant bars another action by the Plaintiff on the same claim.

The claim extinguished includes all rights of the Plaintiff to remedies against the defendant with respect to all or any part of the transaction or series of connected transaction, out of which the action arose (A. 3).

The Court concluded correctly (nor does Rose dispute) that the State action arose from the same land taking as did the claims asserted in Federal Court and further that the judgment entered by the State Court was a judgment on the merits within the definition of the claims preclusion aspects of the doctrine of res judicata. The Court further concluded that in order to be successful in asserting claims in Federal Court, Rose must find an exception freeing him from the legal doctrine against claim splitting (A. 4). The Court then proceeded to address each of Rose's arguments and concluded that no exception was here applicable.

The respondent will refrain from restating and rearguing what the Court of Appeals set forth in its decision relative to the claims preclusiveness of the State Court judgment. To reargue would add little to the considerations here involved and respondent adopts the reasoning set forth and authorities cited in support of the conclusion that the State Court judgment was one on the merits.

IV. Certiorari Should Be Denied Because the Preclusive Effect of the Judgment Rendered in State Court Has Not Been Waived by the Respondent Nor Does that Decision Create a Lack of Repose and Reliance as Alleged by Petitioner.

Rose argues that the Town has waived the judgment in its favor enacted in 1980 by the Massachusetts Court by virtue

of the fact that as alleged by Rose, the Town has continued to issue a tax bill on the land described in the deed by which Rose claims title. It is this land that Rose claims the Town took as part of the 1968 land acquisition for water supply purposes.

The sending of a tax bill it is submitted does not provide an adequate factual bill for concluding in these circumstances that the Town has or intended to waive the State Court judgment in its favor. On the contrary, the Town intended to rely on that judgment and it is Rose who has continued the litigation after that final judgment first in the U.S. District Court then in the U.S. Court of Appeals and now in the highest court in this land the Supreme Court of the United States. Rose, during the entire course of proceedings has argued that the taking was invalid, so it is not surprising that due to this protracted litigation the Town is uncertain concerning how to treat this situation.

Since the situation is one of Rose's making, he should not be heard to complain if confusion has been created in the mind of the other party to litigation.

Beyond this factual argument, a legal distinction must be made between the type of judgments that can be waived and the type of judgments that cannot be waived. As the Court of Appeals held the judgment of dismissal in the State Court is based on the Statute which requires the action be brought during a certain time frame or the right as well as the remedy is lost and with that loss the Court is without "jurisdiction" to entertain the action. It is a principle of law to well established to require citation that parties by their action or by their agreements cannot confer upon a court jurisdiction when pursuant to applicable law it is without jurisdiction.

V. Certiorari Should Be Denied Because the Case Does Not Meet the Standards for Review Set Forth by Supreme Court Rule 17.

The power to review by certiorari should be exercised sparingly and with great caution. *Ex Parte Lau Ou Beu*, 141 U.S.

583 (1881). Supreme Court R. 17 embodies criteria by which the Court determines whether a particular case merits consideration. The Rule permits review when (1) a decision of one Court of Appeal is in conflict with another Court of Appeal (2) where a case involves significant constitutional question or (3) involves an issue of substantial public interest. Supreme Court R. 17; *see Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955).

The Court in *Rice* found a question raised by a Petitioner may be "of substance" in the sense that, abstractly considered, it may present an interesting and sound problem, but the court went on to hold "... this court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the *benefit of the particular litigants.*" 349 U.S. at 74-75. Likewise, nothing warrants this court sitting for the benefit of Rose. Indeed, Rose has completely failed to fulfill any requirements of rule 17. Nowhere in Rose's brief does he assert that decisions of the Courts of Appeal are in conflict. Neither does an issue of substantial public interest exist. Rose is only concerned with his individual problem resulting from his untimely failure to fill a petition under the clear requirements of G.L. c. 79, § 16 and furthermore, no significant constitutional question exists. As the argument *supra* demonstrates, eminent domain statutes have withstood earlier constitutional challenges. Well settled case law already has resolved any constitutional questions concerning eminent domain.

Finally, the Supreme Court must necessarily depend on District Court and Courts of Appeal for initial determination of State Law, and its practice of deference to such determinations should generally render unnecessary review of decisions in such respect. *Court v. Ash*, 422 U.S. 66 (1975). Both the District Court and the Court of Appeals correctly held Rose was barred from re-litigation. There is no need for further review.

In summary it was Rose who chose the State forum as the appropriate forum in which to litigate a land damage claim. It was Rose who decided not to take an appeal from that decision. As this court said in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) "We have stressed that '[the] doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is rule of fundamental and substantial justice, of public policy and private peace, which should be cordially regarded and enforced by the courts . . .' " [*citation omitted*] "[t]he language used by this Court half a century ago is even more compelling in view of todays crowded dockets". 452 U.S. at 401.

"The predicament in which Respondent finds himself is of his own making . . . we cannot be expected for his sole relief to upset the general and well established doctrine of res judicata conceived in the light of the maxim that the interest of the State requires that there be an end to litigation — a maxim which comports with common sense as well as public policy and the mischief which would follow the establishment of precedent for so disregarding this salutatory doctrine against prolong strife would be greater than the benefit from the result from relieving some case of individual hardship." *Reed v. Allen*, 286 U.S. 191, 198-199 (1932).

Conclusion

It is respectfully submitted that the Petitioner has failed to sustain its burden of establishing under Rule 17 that there are special and important reasons why the writ should be granted. The decision below did not involve an important question of federal law which has not been decided by this court. Nor has any court of appeals decided a federal question in conflict with this court or Court of Appeals.

The Court of Appeals correctly held the findings of fact and conclusion of law of the trial court were not clearly wrong. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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